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November 9, 2004

Mary L. Cottrell, Secretary  
Department of Telecommunications and Energy  
One South Station  
Boston, MA 02110

Via electronic and U.S. Mail

RE: **D.T.E. 04-1, Investigation Regarding The Assignment Of Interstate Pipeline Capacity Pursuant To D.T.E. 98-32-B, D.T.E. 04-1**

Dear Secretary Cottrell:

I am writing on behalf of Direct Energy Services, LLC ("Direct Energy") in support of Motions for Confidential Treatment filed by several local gas distribution companies with respect to information provided in response to Information Request DTE-LDC-1-7 in this docket. The information request at issue states as follows:

Please provide information on marketers serving the Company's service territory during the period 1996-present on a seasonal basis (heating and non-heating seasons) as depicted in Table 3: "Active Marketers"

Table 3: "Active Marketers" sought the following information for marketers doing business in each LDC's service territory, for each year from 1996 to the present:

- ?? Winter volume (MMBTU) and percent of total winter volume
- ?? Summer volume (MMBTU) and percent of total summer volume
- ?? Total volume (MMBTU) and percent of total sendout

The LDCs responded in various ways to this information request. All but Berkshire Gas Company and Bay State Gas Company took steps to protect the disclosure of the actual names of marketers associated with volume and market share data provided in their responses. The other LDCs were asked by the Department to disclose the identities of the marketers associated with the data previously released. On November 4 and 5, 2004, four LDCs, NSTAR Gas, New England Gas, Keyspan, and Fitchburg Gas and Electric filed motions for confidential treatment of the identities of the marketers associated with the volume and market share data requested in

Information Request DTE-LDC-1-7. Direct Energy supports each of these motions and respectfully requests that the Department both grant the motions and take this opportunity to adopt a policy generally disfavoring the disclosure of any individual competitor's market share information, whether in the form of sales volume or percentage of total sendout.

As a licensed marketer in Massachusetts, Direct Energy cannot emphasize strongly enough the harm that will be done to the continued development of the competitive market in Massachusetts from allowing the release of information regarding a specific competitor's market share. Direct Energy considers such company-specific information to be precisely the kind of "confidential, competitively sensitive or other proprietary information" that is contemplated by G.L. c. 25, § 5. As the LDCs' motions point out, a competitor's market share in any particular LDC service territory, or in the Commonwealth generally, can reveal a great deal about that competitor's business plans and priorities within the state. This revelation, in turn, could create competitive inequities among marketers based solely on the disclosure of sensitive information through an administrative process rather than based on any true competitive advantage of one marketer over another. Indeed, the longer a marketer has been doing business in Massachusetts, the more years of its market share data would be revealed to potential competitors, creating an unfair advantage for new entrants and a perverse disincentive for sustained commitment to the Massachusetts market.<sup>1</sup>

The mere fact that disclosure of market share information could have some impact on competitors might not by itself overcome G.L. c. 25, § 5D's presumption in favor of public disclosure. In addition, however, the negative impacts on competitors will result in negative impacts for consumers as well, and these negative impacts clearly justify non-disclosure. The harm to consumers that would result from disclosing market share data of specific competitors is very similar to the harm that would result from disclosing specific bids in an auction process (as in Fitchburg Gas and Electric, D.T.E. 98-121) or the pricing terms of supply contracts that are the result of a competitive RFP (as in Berkshire Gas Company, D.T.E. 01-41). Competitive markets tend to work best for consumers when suppliers must offer their very best price, service, and other contract terms in order to attract customers. Government-imposed disclosure of sensitive competitive information tends to undermine this fundamental dynamic by allowing competitors to base decisions on what they believe will beat other competitors rather than on what will be most attractive to customers.

Auctions provide the clearest example of this phenomenon. As the Department found in Fitchburg Gas and Electric, forcing the company to disclose all of the bids received in response to an auction of the company's interest in New Haven Harbor Station and other assets "could undermine its efforts to secure the highest bids during the on-going divestiture process. The

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<sup>1</sup> Direct Energy notes that it has only recently been granted a gas marketer license in Massachusetts, and so could potentially benefit from the disclosure of its competitors' market share data in the current proceeding. Nonetheless, Direct Energy is convinced that disclosure would constitute poor policy, and would gladly forego a short-term advantage in favor of a more sensible long-term approach.

Department notes that protecting this information from public disclosure would likely add value to the Company's assets, and increase its ability to negotiate higher prices for their non-nuclear portfolio." Public disclosure of all bids received in response to an auction RFP will, over time, tend to suppress the "winner's curse," that is, the difference between the winning bid and the next lowest bid, in auctions of similar assets. The winner's curse represents pure consumer surplus, and regulatory processes that tend to reduce it do consumers no favor.

Competitive gas marketers may not win customers through an auction, as in the Fitchburg Gas and Electric case, but public disclosure of market share information could have a similarly suppressive effect on consumer surplus in the gas markets. A marketer that discovers that it has a greater percentage of the market in a particular LDC service territory than it might otherwise have believed may decide that it can raise its prices by some incremental amount without losing market share. A marketer seeking to enter a particular LDC's service territory for the first time might delay or cancel those plans if it discovers that a competitor has a more dominant market share than previously thought. The cumulative impact of such decisions will, over time, reduce customer choice and reduce the consumer surplus that competitive markets typically create.

The fact that, to Direct Energy's knowledge, no other state allows or compels such disclosure of market share information will also, over time, reduce Massachusetts' competitiveness with other states. Direct Energy would never claim that retail gas markets are a zero-sum game, but it is a fact of all markets that competitors deploy resources where they believe they will earn the best return. States with policies that protect the integrity of competitive markets will win out over states with policies that do not. Again, consumers will not be well-served by policies that tend to reduce rather than expand the competitive options available to them.

Finally, there appears to be no benefit whatsoever to the legitimate functions of the Department from public disclosure of market share information that would tend to counter-balance the negative impacts on consumers discussed above. In fact, it is not clear what incremental benefit accrues to the Department from knowing a particular competitor's market share in a particular LDC service territory, much less from knowing every competitor's market share in every LDC service territory, whether or not such information is publicly disclosed. To the extent there are legitimate reasons for the Department to gather this information, those interests can be served without disclosing such competitively sensitive information to other competitors and to the public at large.

For these reasons, Direct Energy respectfully requests that the Department grant the Motions for Protective Treatment filed by NSTAR Gas, New England Gas, Keyspan, and Fitchburg Gas and Electric with respect to the identities of marketers provided in response to Information Request DTE-LDC-1-7. Direct Energy also respectfully requests that the Department adopt a policy, to be adhered to by all LDCs and electric distribution companies, that market share information regarding competitive suppliers identified by name shall not be

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publicly disclosed without application to the Department showing the need for such public disclosure. At the very least, the competitive marketers or suppliers whose market share information would be disclosed should be alerted to the proposed disclosure and allowed an opportunity to oppose it. Direct Energy notes that in this case two LDCs, Berkshire Gas and Bay State Gas, released unredacted responses to DTE-LDC-1-7 without prior notice to the marketers that would be affected. This situation should be avoided in the future even if the Department determines after due consideration that market share information can be publicly disclosed in some circumstances.

Thank you for your kind attention to this matter.

Yours truly,

A handwritten signature in black ink, appearing to read "CH Kallagher", with a stylized flourish at the end.

Christopher H. Kallagher

cc: Service list